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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1973
No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF OF THE APPELLATE COMMITTEE OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AND THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AS AMICUS CURIAE ON BEHALF OF PETITIONER

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This brief is filed with this Court pursuant to the authority found in paragraph 4 of Rule 42 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

This Court has afforded an opportunity to each Attorney General of every State or Commonwealth to file an amicus curiae brief in this case.

This brief presented by the Office of the Los Angeles District Attorney on behalf of the Appellate Committee of the California District Attorneys Association and joined by the Attorney General of the State of California is basically directed as to the questions raised relating to misdemeanor prosecutions. Under California's Constitution and statutes in every felony prosecution not initiated by indictment the right to a preliminary hearing is afforded any person (Cal.Const.Art. I, Sec. 8; Cal.Pen. Code Secs. 17(a), 738-739, 858-883, 949).

Since misdemeanor prosecutions in California are customarily processed at trial and on appeal by district attorneys and city attorneys the matter was referred by the Attorney General to the Appellate Committee of the California District Attorneys Association which authorized the filing of the brief.

By virtue of the importance of this case to the administration of criminal

justice in misdemeanor cases and to the criminal justice system as a whole in California the Office of the Attorney General of California has joined in this brief.

SUMMARY OF THE ARGUMENT

In Argument I we discuss those factors which appear to us to have been heavily weighed by the courts below and unduly influenced them in concluding that a probable cause preliminary hearing is constitutionally required in all prosecutions of persons in actual custody awaiting trial. These factors relate to what we perceive to be the principal causes of grievance and they are the formerly existing practices in Florida of holding a person in actual custody a substantial time before charges are filed and before there is a trial. We also point out a few matters which were insufficiently considered by the courts below.

We discuss in Argument II whether the equal protection clause requires that an accused charged with a misdemeanor is entitled to a preliminary hearing if he is in actual custody just because a felony defendant is entitled to such a hearing (unless waived or indicted by grand jury) -- having assumed only arguendo that a felony defendant is constitutionally entitled to such a hearing. Our conclusion is in the negative because there are differences between misdemeanor and felony prosecutions. These differences include

the gravity of the offense (considered either with respect to the stigma which attaches to a conviction or the potentially greater punishment), the longer time limits which are reasonably permitted before an accused is brought to trial, and the practical need not to further congest the calendars of inferior courts.

In Argument III we show that the courts granted relief to defendants in actual custody in Florida misdemeanor prosecutions which accords them rights which are not accorded to defendants charged with misdemeanors in federal prosecutions. Specifically, we show that defendants charged with misdemeanors in federal prosecutions are not entitled to preliminary hearings although they are entitled to having probable cause determinations if they have been or will be arrested on the accusatory pleading. Our argument assumed only arguendo that there is a federal constitutional right to a pretrial probable cause determination for a misdemeanor defendant in actual custody.

In Argument IV we show how in California the law provides ample protection to defendants charged with misdemeanors who are held in actual custody awaiting trial and that there is no federal consti-

tutional right to have a probable cause preliminary hearing or an automatic pre-trial probable cause determination (unless waived) in such cases.

Finally, in Argument V we argue that the courts below exceeded their authority in granting the relief complained of by petitioner because such relief exceeded that which is compelled by the United States Constitution and that by such relief the courts below improperly attempted to supervise the administration of criminal justice in the courts of the State of Florida.

ARGUMENT

I

THE COURTS BELOW HAVE GRANTED RELIEF WITHOUT SUFFICIENT CONSIDERATION OF FACTORS WHICH HAD THEY BEEN FULLY APPRECIATED WOULD HAVE AFFECTED THE NATURE AND SCOPE OF THE RELIEF GRANTED

In this portion of our brief we wish to set forth our views as to what are <u>not</u> the issues for the purpose of making clear the import of our positions as to the matters which interest us in this case. In so doing, we hope to note pseudo-issues which may becloud the resolution of the true issues.

(1) First, we think that a proper resolution of the issues of this case may be obscured by failing to distinguish the problems relating to the requirement of a determination by a judge or magistrate that probable cause exists for believing that the defendant committed one or more of the public offenses charged against him in the accusatory pleading and those relating to the right of a person in custody to be taken before a magistrate without "unnecessary delay" so that he may be informed of his rights and of the charges

under which he is being held in custody, with an opportunity to be released on bail or on his own recognizance. Thus, the Court of Appeal below recited that:

> "Criminal actions in Dade County, therefore, often proceed upon information sworn to by the state attorney either before or after arrest without any judicial scrutiny prior to arraignment. If unable or unwilling to post bail, arrestees remain in jail at least until arraignment. This incarceration may last as long as 30 days, and at least three days must pass before an information is filed against an arrestee and the case is calendared. During this period, the defendant sees no judicial officer other than the bail judge. Arraignment is the first opportunity for a magistrate to inspect the state attorney's information setting forth the cause upon which the defendant

> was arrested." (483 F.2d 778, at 780-781. Fn's. omitted.)[1/]

Briefly, we should point out that in California an arrested person must in all

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1. Delays before arraignment on an information are more fully discussed in Pugh v. Rainwater, 332 F.Supp. 1107, at 1109-1111. In a deposition by Mr. James Reagan, Jr., he stated that he knew of no case in which a police officer presented himself before the State Attorney to file the information more than a month after an arrest and he "cannot recall of anything over two weeks, personally. Of course, I am not saying there have not been occasions." (See Appendix on Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit, 32, at 47-48.) In "jail cases" he stated that the information is processed by the prosecutor's office within 72 hours at the outside (counting working days only) and ordinarily filed the nearest working day. (Ibid., at 49-51.) He further testified that "the average would be between ten and fifteen days" from the time the complaining party appears before the prosecutor and the case is put on the calendar and the defendant appears in court. (Ibid., at 57.) Of course, in view of the subsequent adoption of Rules 3.130(b)(1) and 3.131 of the Florida Rules of Criminal Procedure, as amended, much of the delay problems relating to the filing of the accusatory pleading and arraignment are resolved. Rule 3.130(b)(1) requires that "every arrested person shall be taken before a judicial officer within twenty-four (24) hours of his arrest." By virtue of Rule 3.131 an information must be filed within 96 hours from the time of the defendant's first appearance when the defendant is in custody.

cases be taken before the magistrate without unnecessary delay, and in any event, within two days after his arrest, excluding Sundays and holidays. If a detention of less than two days is unreasonable under the circumstances, such detention is in violation of statute. (See, Cal.Pen. Code, §§ 825, 849; People v. Powell (1967) 67 Cal.2d 32, 59, 429 P.2d 137.) The right to be taken before a magistrate without unnecessary delay is a fundamental right of the arrested person arising from the Constitution which must be obeyed. (See, People v. Powell, supra, 67 Cal.2d at 59-60.) A violation of a defendant's right to be taken before a magistrate without unnecessary delay does not require reversal "unless he shows that through such wrongful conduct he was deprived of a fair trial or otherwise suffered prejudice as a result thereof." (People v. Combes (1961) 56 Cal. 2d 135, 142, 363 P.2d 4.) However, the writ of habeas corpus is available as a remedy to secure compliance with the requirement that an arrested person be taken before a magistrate without unnecessary delay. It "is commonly used to test the legality of the restraint of one who is arrested and detained without warrant or without any charge being brought against

him. The effect of the writ at this stage is to compel the arresting officers either to release him or to charge him with an offense cognizable in the law, for one cannot be held, tried, or sentenced except for a specific crime constituting a crime." (24 CAL. JUR. 2d, Habeas Corpus, § 25, pp. 448-449. Fn's. omitted.)

We have set forth at length these matters concerning an arrested person's right to be taken before a magistrate without unncessary delay and to be charged with an offense in an accusatory pleading or be released from custody because it appears to us to have been inextricably entangled with consideration in the courts below as to who, when, and in what manner the question of probable cause to detain a person in custody for trial on criminal charges is to be resolved. It is no doubt that because in Florida an arrested person could formerly remain incarcerated up to approximately thirty days before an accusatory pleading is filed and be arraigned on such charges that the Court of Appeal and the District Court undertook

an overly broad supervision of the administration of criminal justice in Florida and required prophylactic rules which go far beyond, in our opinion, of what is required by the United States Constitution.[2/] With all due respect, this may be an instance of the maxim that bad cases make bad law.

(2) Again, an ominous cloud which obfuscates a clear resolution of the issues raised in this proceeding may have been formed by concern for the right of speedy trial for persons charged with misdemeanors who remain in custody (i.e., they have not been released on bail or on recognizance) beyond thirty days (approximately). Under Florida law, unless a case is continued for good cause, every person charged with a

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2. We do not wish to be understood as implying that the writ of habeas corpus is not available under Florida law as a remedy for unreasonable delays in the process of either releasing an arrested person from custody or being charged formally and being arraigned promptly. (See, Florida Constitution, Declaration of Rights, § 7; Florida Statutes Annotated, Chapter 79, §§ 79.01-79.12.) We do not presume to undertake to discuss the availability of the writ in Florida courts for the purposes in question, but we are puzzled by the fact that there has been no discussion of its possible availability by petitioner, respondent, the Court of Appeals or the District Court, except insofar as it was adverted to by counsel before this Court in oral argument. (See 42 U.S.Law Week 3549-3550.)

crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor or upon demand within 60 days. (Rule 3.191, Florida Rules of Criminal Procedure.) We will argue more extensively that a speedy trial in a misdemeanor case of a person in custody itself provides implicitly a speedy determination of the issue whether the accused has been detained upon probable cause to believe he has committed one or more of the offenses charged against him. That is, the trial itself constitutes a <u>hearing</u> upon the issue of probable cause.

We do not think for reasons set forth herein that a person in custody charged with a misdemeanor is entitled to a preliminary hearing upon the issue of probable cause to detain him for trial. At most, he is entitled to have the issue of probable cause for his detention for trial resolved by a magistrate or judge without such hearing. A hearing on the issue provided by a trial provides a substitute device for resolving the matter. Without urging upon this Court that a trial within sixty days after arraignment upon demand of a person in custody on misdemeanor charges constitutes an unreasonable

period in which probable cause issues can be determined, any infirmity in Florida law respecting this matter should not be visited upon those States which provide for speedy trial within shorter time limits than those of Florida. For example, California Penal Code section 1382 provides in part:

> "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
>
> * * * * *
>
> "3. Regardless of when the complaint is filed, when a defendant in a misdemeanor case in an inferior court is not brought to trial within 30 days after he is arraigned if he is in custody at the time of arraignment, ... except that an action shall not be dismissed under this subdivision (1) if it is set for trial on a date beyond the prescribed period at the request of the defendant or with his consent, express or implied, and the defendant is brought to trial on the date so set for trial or within 10 days thereafter or (2) if it is not tried on the date

> set for trial because of the defendant's neglect or failure to appear, in which case he shall be deemed to have been arraigned within the meaning of this subdivision on the date of his subsequent arraignment on a bench warrant or his submission to the court.
>
> "If the defendant is not represented by counsel, he shall not be deemed under this section to have consented to the date for his trial unless the court has explained to him his rights under this section and the effect of his consent."

Under California law, unless there is some other cause for detaining a person in custody, if a case is not brought to trial within the time limits of the mandatory dismissal statutes and a motion to dismiss for want of a speedy trial is denied, the defendant may secure his release on habeas corpus if there is no plain, speedy, or adequate remedy, or by some other appropriate remedy which the law has provided. (In re Alpine (1928) 203 Cal. 731, 740, 265 P. 947.) A prisoner may not be released on habeas corpus until the statutory period has expired even where the order

unlawfully provided for an extension for a period beyond the statutory period. (Ex parte Ross (1889) 82 Cal. 109, 110, 22 P. 1086.) However, under current practice a defendant is entitled to the extraordinary writ of mandamus to compel the dismissal of charges where the case has not been brought to trial within the time limits of the statutory dismissal statutes or to the writ of prohibition to prevent the trial. (See, Witkin, CALIFORNIA CRIMINAL PROCEDURE (including 1973 Supplement) § 307; Barker v. Municipal Court (1966) 64 Cal.2d 806, 415 P.2d 809.) It should be noted that historically the writ of habeas corpus is available to enforce the right to a speedy trial and statutory time limits, but "does not entitle the accused to a discharge on account of the failure of the law, while reasonably adapted to secure a speedy trial, to provide against every contingency which may occasion delay made necessary by the law itself." (W. Church, TREATISE ON THE WRIT OF HABEAS CORPUS (2d Ed. 1893), § 254, pp. 355-356. Fn's. omitted.) We feel that the hidden issue of the constitutional right of a person in actual custody to a speedy trial on misdemeanor charges has been excaberated by substantial

prearraignment delays which formerly took place in Florida.

It is our position, to be advocated herein, that a defendant in actual custody on the misdemeanor charges who has a trial within 30 days after he is arraigned without necessary delay is afforded a speedy determination of whether there was probable cause to detain him for trial in conformity with due process of law. While a trial of a person in custody upon demand within sixty days does not offend the Constitutional right to a speedy trial, we think it important to inquire whether it provides an early enough device for determining the probable cause issue if raised by the defendant in custody.

In this connection, it is noteworthy that the National Advisory Commission on Criminal Justice Standards and Goals recommended that "[p]reliminary hearings should not be available in misdemeanor prosecutions." Its reason was, "[g]iven the minor penalties that may be assessed for conviction of a misdemeanor, such prosecutions need not involve the complexities of a felony case. . . . [¶] Since a misdemeanor trial will occur quickly and its burden is significantly less than that of a felony trial, the Commission

believes that the preliminary hearing - and the protection it may afford against an unjustified trial - is not necessary in misdemeanor cases." (COURTS, Standard 4.3, p. 73.) The Commission also recommended that, "In a misdemeanor prosecution, the period from arrest to trial generally should be 30 days or less." It commented, "The periods in the standard are significantly shorter than many other proposals, but the Commission believes that they are realistic if it is recognized that they relate only to the norm or average and do not impose outside limits."

We submit that a factor which may have heavily weighed upon the courts below was that Florida's time limits for misdemeanor trials of persons in custody establish norms which may be insufficient for using the trial as a reasonably speedy forum for determining probable cause for holding for trial and obviating the need for a preliminary hearing or another form of pretrial probable cause determination.

(3) We are also apprehensive that insufficient consideration has been given to exactly what is encompassed in a proceeding to determine whether probable cause exists to believe that a defendant in custody has committed one or more of

the offenses charged against him. There may have been an unlawful arrest for any number of grounds, including the absence of probable cause on the part of the arresting officer or private person. Pursuant to such unlawful arrest, evidence may have been obtained which would be inadmissible under the exclusionary rule if the issue of illegally obtained evidence was raised before or at the trial. Yet, it is well settled that an unlawful arrest does not impair the power of a court to try a person for crime because he had been brought within the court's jurisdiction by reason of such arrest. (Albrecht v. United States (1926) 273 U.S. 1, 71 L.Ed. 505, 508, 47 S.Ct. 250; Frisbie v. Collins (1952) 342 U.S. 519, 96 L.Ed. 541, 72 S.Ct. 509.) "Once an accusatory pleading has been filed . . . a defendant is no longer held on the arrest warrant, and thus he cannot complain solely on the bases of an alleged defect in the issuance of the warrant. It is no defense to a state or federal criminal prosecution that a defendant was illegally arrested or forcibly brought within the jurisdiction of the court. ([Citation to Frisbie v. Collins, supra.]) If he can show that law enforcement officials exploited the period of illegal detention to

obtain evidence utilized at trial, of course, he is entitled to have the evidence suppressed." (People v. Bradford (1969) 70 Cal.2d 333, 344-345, 450 P.2d 46.) It is axiomatic that the state may not use evidence to convict an accused which it obtained by exploiting an illegal arrest or detention. Wong Sun v. United States (1963) 371 U.S. 471, 484-485, 9 L.Ed.2d 441, 453-454, 83 S.Ct. 407; People v. Sesslin (1968) 68 Cal.2d 418, 426-427, 439 P.2d 321.)

It is clear that subject to the exclusionary rules relating to illegally obtained evidence and their poisoned fruit, the mere fact that a defendant has been arrested without probable cause does not defeat the jurisdiction of the court to proceed with the prosecution. The question is solely whether there is probable cause to now detain the accused for trial. While it must be acknowledged that the Court of Appeal below does not imply whatsoever that the preliminary hearing on probable cause to hold an accused for trial relates to whether there had been an unlawful arrest, it failed to consider whether the magistrate or judge in determining probable cause to hold an accused in custody for trial must resolve issues relating to

illegally obtained evidence or its fruit at such a hearing. If the issue is raised at the probable cause hearing, must the magistrate exclude evidence illegally obtained because of an unlawful arrest, search, seizure, detention, interrogation, line-up, etc.? - If he can properly exclude evidence of an accused's statements obtained by inherently coercive methods (see Brown v. Mississippi (1935) 297 U.S. 278, 80 L.Ed. 682, 56 S.Ct. 461), must he also exclude evidence of an accused's statements obtained not by inherently coersive methods but only in violation of rules respecting admonition of rights prior to interrogation announced in Miranda v. Arizona (1966) 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602? If the magistrate can properly exclude evidence obtained by "conduct that shocks the conscience" (Rochin v. California (1952) 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205), must he also exclude evidence obtained by searches or seizures by conduct which does not shock the conscience, such as in Chimel v. California (1969) 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034? Other problems suggest themselves, and we regret to note that neither the Court of Appeal nor the District Court addressed themselves to them.

We are of the view that if this Court holds (contrary to our position) that a preliminary hearing is required in misdemeanor prosecutions to determine whether there is probable cause to hold the defendant for trial, then it should make clear that any hearing or determination should not be burdened with issues relating to exclusionary rules. (Cf. United States v. Calandra (1974) ___ U.S. ___, 38 L.Ed.2d 561, 94 S.Ct. 613.) This is especially vital for those states which provide for resolution of such issues before or at the trial upon motion.[3] The necessity for such a restriction upon any such probable

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3. California Penal Code section 1538.5, which establishes procedures for litigating search and seizure issues, provides in part:

> "(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure . . . . (h) If, prior to the trial of a . . . misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice . . . court."

cause to hold for trial proceeding in misdemeanor cases becomes compelling since (as we understand it) the hearing can be held before the accused pleads to the accusatory pleading and whether or not he moves to raise issues relating to illegally obtained evidence.

II

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE A PROBABLE CAUSE PRELIMINARY HEARING FOR A PRISONER CHARGED WITH A MISDEMEANOR[4]

We have responded to the request for the filing of amicus curiae briefs in the instant case because the State of California has a vital interest in some of the issues now pending before this Court.

However, we should first point out what is not of such interest to prosecutors in this state such as to motivate us to add our views to those already so forcibly advocated by others. We refer specifically to the issue whether due process of law requires that in felony prosecutions not initiated by grand jury indictment there is

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4. As used hereafter in this brief the term "misdemeanor" refers to crimes made punishable by imprisonment which does not exceed one year. (See 18 U.S.C. §1; Cal.Pen.Code, §§ 17, 19a.)

a federal constitutional right to a probable cause preliminary hearing held reasonably soon after an arrest for an accused in actual custody.

Whether a probable cause preliminary hearing for an accused in actual custody is required by federal constitutional law in the prosecution of a felony, not initiated by grand jury indictment, is not a matter which we shall discuss herein because by virtue of our State Constitution and statutes the right to such a hearing is afforded any person charged with a felony unless such prosecution is initiated by grand jury indictment.[5]

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5. As used hereafter in this brief, by "probable cause preliminary hearing," "preliminary hearing," or "preliminary examination," we mean a hearing conducted before a judge or magistrate for the purpose of determining whether there is reasonable or probable cause to hold a defendant for trial and that at such hearing the defendant has a right to be present and have the assistance of counsel, to cross-examine witnesses, and to present a defense. The testimony at such a hearing is to be recorded verbatim. See, National Advisory Commission on Criminal Justice Standards and Goals, COURTS (1973), p. 12; Rule 5.1(a) (Preliminary Examination), Federal Rules of Criminal Procedure; Cal. Const., Art. I, § 8; Cal.Pen.Code, §§ 17, subd. (a), 737-739, 858-883, 949; Rule 3.131, Florida Rules of Criminal Procedure. By "felony" we mean a crime which is punishable

(continued on page 25)

We do not wish to be understood as conceding that there is a federal constitutional right to a probable cause preliminary hearing in felony prosecutions (whether or not the accused is in actual custody), because the law of this state provides such a right. Our interest in the instant case is compelled by the declaration by the Court of Appeal for the Fifth Circuit that --

> ". . . except where misdemeanants are out on bond or are charged with violating ordinances carrying no possibility of pretrial incarceration, they must be accorded preliminary hearings.[18] In short, the offense charged is irrelevant to the man incarcerated prior to trial; he must, therefore, be afforded a preliminary hearing regardless of his status as an accused misdemeanant or an accused felon." (Pugh v.

(continued from page 24)
by imprisonment for more than one year. By "probable cause determination" as used in the brief we mean a determination made by a magistrate or judge on the issue of probable cause which can be made ex parte without examination of witnesses.

Rainwater (5th Cir. 1973) 483 F.2d 778, at 789. Fn's. omitted.)[6]

We are strongly opposed to the requirement imposed by the courts below upon the State of Florida that prisoners awaiting trial on misdemeanor charges are entitled to a probable cause preliminary hearing, unless waived. The law of the State of California does not provide for such a hearing in misdemeanor cases and we urge that a right to such a hearing is not required by the United States Constitution. The purpose of this brief is to show why such is the case.

At the outset, assuming only arguendo as we shall do in this brief that there is a federal constitutional right to a probable

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6. In note 18 (438 F.2d at 789) the court, referring to violations of ordinances carrying no possibility of pretrial incarceration, comments: "These offenses, which probably include those referred to by the district court as 'prosecutions of the barking dog variety,' may reasonably be screened by the State Attorney alone at the request of complaining citizens because the defendant in such cases is not confined prior to trial." This may be an appropriate place to note that under California law a defendant may deposit a sum of money instead of giving bail (Cal.Pen.Code, §§ 1295 et seq.) or be released on his own recognizance, subject to certain conditions (Cal.Pen.Code, §§ 1318 et seq.).

cause preliminary hearing in felony cases for persons in actual custody not initiated by grand jury indictment, we shall briefly explain why we urge that equal protection of the laws (U.S. Const., Amend. XIV, § 1) does not require a state to provide prisoners charged with misdemeanors with a right to a preliminary hearing because those charged with a felony are entitled to it.

Initially, we shall summarize the functions of the preliminary hearing in felony cases under California law to better understand our thesis that those charged with misdemeanors are not constitutionally entitled to such a hearing.

We have no doubt that the preliminary hearing provides an appropriate mechanism for determining the legality of a detention of one charged with a public offense while he is awaiting trial and that inquiry into the legality of such detention encompasses a determination of probable cause to answer by a neutral and detached magistrate. (See Kenneth Graham and Leon Letwin, The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations, Part II, 18 U.C.L.A. Law Review 916, at 939-942 (1971).) But the preliminary hearing in felony cases is a right of a defendant under the law of California whether or not he is

in actual custody and hence it is not only an appropriate mechanism for determining the legality of the detention of a prisoner.

Under California law, the magistrate at the preliminary hearing is limited by statute to determining whether or not there is probable cause to believe the defendant guilty of a public offense but "[w]ithin the framework of his limited role, however, the magistrate may weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses." (People v. Uhlemann (1973) 9 Cal.3d 662, 667, 511 P.2d 609. Fn. omitted.) However, "[i]t is well established that the defendant at a preliminary examination has the right to examine and cross-examine witnesses for the purpose of overcoming the prosecution's case or establishing an affirmative defense." (Jones v. Superior Court (1971) 4 Cal.3d 660, 667, 483 P.2d 1241.) Additionally, "The preliminary examination is not merely a pretrial hearing, 'The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed.' [Citation.]"

(People v. Elliot (1960) 54 Cal.2d 498, 504, 354 P.2d 225.) As Mssrs. Graham and Letwin set forth in their article on preliminary hearings, such hearings have the following functions:

> "a. 'Discovery' of Evidence. This aspect of the preliminary hearing is of more significance to the defense than to the prosecution. It provides the defense with the opportunity to elicit information and evidence in the possession of the prosecution's witnesses." (Ibid., 18 U.C.L.A. Law Review at 920.)
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> "b. 'Perpetuation' of Evidence. Though defense counsel seldom calls his own witnesses, the perpetuation of testimony, even prosecution testimony, is of importance to him. Not only has he learned what the prospective witnesses have to say, but he 'freezes' their testimony. They may be effectively impeached with their preliminary testimony if it undergoes a metamorphosis by trial; and their preliminary testimony (presumably more favorable to the defense) may then be

qualified as substantive evidence. [¶] The function of perpetuating testimony should be of substantial concern to the prosecutor as well, because of the ever present possibility that an important witness may prove unavailable to testify at trial. . . ." (Id., at 925. Fn. omitted.)

"B. Substitute for Full Trial

[¶] The preliminary hearing is frequently used as a substitute for the full trial. . . . This evidence is used in lieu of viva voce testimony of the witnesses, and in a substantial number of cases no evidence other than the transcript is offered." (Id., at 931.)

"D. Forum for Constitutional Adjudication

. . . . Yet all of our sources and a survey of appellate decisions suggests that the majority of the cases terminated by the preliminary hearing or through the related procedure of a motion to quash the information under Penal Code section 995 are decided on constitutional grounds such as

the inadmissibility of a confession under Miranda or of physical evidence under search-and-seizure doctrines. . . ." (Id., at 942.)7/

For the reasons stated below, it is inappropriate to hold that the equal protection clause requires that a preliminary hearing be held in misdemeanor cases (regardless of whether the defendant is in actual custody or not) just because defendants charged with felonies are entitled to

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7. We note that under Rule 5.1(a), Federal Rules of Criminal Procedure, that "[o]bjections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12." Under California law, a motion to suppress evidence obtained in violation of constitutional provisions relating to searches or seizures may be made at the preliminary hearing (Cal.Pen.Code, § 1538.5, subd. (f)) and if the defendant is held to answer he may move to suppress the evidence in the trial court before trial and, subject to certain limitations, at trial (Cal.Pen.Code, § 1538.5, subd. (i) and subd. (j)). If a state provides for litigating issues relating to illegally obtained evidence at a preliminary hearing in felony cases then does the equal protection clause require the state to allow such a procedure in misdemeanors? -- assuming that such clause requires procedural equality between misdemeanors and felonies?

a preliminary hearing, unless the prosecution is initiated by indictment. That is, the determination by a magistrate, peace officer, or prosecutor that probable cause exists to justify an arrest (with or without a warrant) does not require that the supporting evidence be admissible under the rules of evidence applicable to trials. (See, e.g., Draper v. United States (1959) 358 U.S. 307, 311-312, 3 L.Ed.2d 327, 330-331, 79 S.Ct. 329.) However, in California for example, while the evidence presented in a felony preliminary hearing is required to show that there is probable cause to believe that the offense charged has been committed and that the accused committed the offense it need not be legally sufficient to support a conviction (see Rideout v. Superior Court (1967) 67 Cal.2d 471, 474, 432 P.2d 197), the commitment by the magistrate must be based upon competent evidence, i.e., evidence which would be admissible (unless there is no objection) in a trial on the merits. (See, e.g., People v. Schuber (1945) 71 Cal.App.2d 773, 775, 163 P.2d 498.) The reason for this further requirement needs no elaborate exposition. Given the gravity of the felony offense either by reason of the greater potential punishment or the stigma of the conviction which would

attach and because it is virtually universally conceded that it is appropriate that the time limits for trials after arrest or similar process are longer than in misdemeanor cases then there is a sound public policy which is furthered by the law which requires that the evidence at a preliminary hearing which establishes probable cause be competent. That public policy applicable to preliminary hearings has been established not only in the interest of society but in the interest of an accused charged with a serious offense. The same considerations do not generally apply to misdemeanor prosecutions. If there is a federal constitutional right for prisoners in misdemeanor prosecutions to have a probable cause determination before trial by a magistrate or judge, we submit it does not follow that such a determination requires a preliminary hearing. We shall argue this matter further. It suffices for our purpose at this point to urge that the equal protection clause does not require a preliminary hearing for prisoners charged with misdemeanors simply because state law provides for the right to have a preliminary hearing for those charged with a felony whether or not they are in actual custody. Thus, the National Advisory Commission on Criminal Justice Standards and Goals

recommended that "[p]reliminary hearings should not be available in misdemeanor prosecutions" because:

> "Given the minor penalties that may be assessed for conviction of a misdemeanor, such prosecutions need not involve the complexities of a felony case. This standard suggests methods of simplifying the processing of misdemeanor cases. [¶] Since a misdemeanor trial will occur quickly and its burden is significantly less than that of a felony trial, the Commission believes that the preliminary hearing-and the protection it may afford against an unjustified trial-is not necessary in misdemeanor cases." (COURTS, Standard 4.3 Procedure in Misdemeanor Prosecutions, p. 73.)

Additionally, there is a much greater probability that those charged with misdemeanors will be released on bail or its equivalent or on their own recognizance than those charged with felonies. In misdemeanors, statutes and recommendations by advisory bodies such as the Commission provide for mandatory time limits for which

are substantially shorter in misdemeanor as compared to felony cases. (Ibid., Standard 4.1 Time Frame for Prompt Processing of Criminal Cases, at p. 68: "The period from arrest to the beginning of trial of a felony prosecution generally should not be longer than 60 days. In a misdemeanor prosecution, the period from arrest to trial generally should be 30 days or less.")

Now, if a person charged with a felony is entitled to a preliminary hearing as a matter of right (unless waived or if the prosecution is initiated by grand jury indictment) then it seems to us that it would violate equal protection of the laws if a non-prisoner charged with a misdemeanor would not be entitled to a preliminary hearing because equal protection of the laws requires that a prisoner charged with a misdemeanor is entitled to a preliminary hearing. Given all the advantages of a preliminary hearing other than the determination of probable cause, a non-prisoner would not have those other advantages. Moreover, the prisoner having a preliminary hearing would have available or could procure a transcript of the hearing but a non-prisoner would not. The problem is compounded because it is not required that the testi-

mony at misdemeanor trials to be reported and transcribed verbatim. Thus, a non-prisoner who was tried might be convicted and his punishment might include imprisonment but he would not have a benefit of a transcript - neither of the preliminary hearing nor of the trial. The fall-out from the anomolies suggested by the action by the courts below vis a vis probable cause preliminary hearings for prisoners charged with misdemeanors would be as unpredictable on the "ecology" of the administration of criminal justice as the introduction of some new pesticide might be on the web of life. Finally, the creation of a federal constitutional right to have a preliminary hearing in misdemeanor cases would further delay the time for trial for those in actual custody. The inferior courts would face additional problems relating to congestion of their calendars and the speedy disposition of cases. (Cf., the observations by this Court concerning misdemeanor prosecutions as set forth in Arsensinger v. Hamlin (1972) 407 U.S. 25, 32 L.Ed.2d 530, 536-538, 92 S.Ct. 2006, 2011-2012.)

Having disposed of the contention that equal protection requires that a prisoner charged with a misdemeanor is entitled to a probable cause preliminary hearing, we shall

now turn to the question whether due process of law (including the Fourth Amendment made applicable to the states by virtue of the Fourteenth) requires such a hearing.

III

THE RELIEF GRANTED WITH RESPECT TO PRISONERS AWAITING TRIAL ON MISDEMEANOR CHARGES EXCEEDED THE AUTHORITY OF THE FEDERAL COURTS BELOW BECAUSE SUCH RELIEF REQUIRES MORE OF STATE COURTS AND PROSECUTORS THAN IS REQUIRED BY THE UNITED STATES CONSTITUTION OR FEDERAL LAW GOVERNING MISDEMEANOR PROSECUTIONS

We assume arguendo that there is a federal constitutional right for a prisoner to have a probable cause preliminary hearing before trial in a felony case. Moreover, we shall assume (and we do believe) that there is no federal constitutional right for a person neither in actual nor constructive custody to have a probable cause preliminary hearing in a felony case. That is, we certainly do not think that a felony prosecution cannot be validly initiated by a prosecutor who makes an initial determination of probable cause and that a similar determination need not be made by a magistrate or judge if the accused remains at liberty on his own recognizance. In such a situation, his position is no more different than a witness who is not detained or who have not been released on bail to secure his

appearance. (Cf., Albrecht v. United States (1926) 272 U.S. 1, 71 L.Ed. 505, 47 S.Ct. 250.)

We shall assume arguendo (and only arguendo) in this portion of our brief that in misdemeanor prosecutions a prisoner is entitled to a reasonably early pretrial determination of probable cause to hold him for trial by a neutral and detached magistrate.[8] If we make that assumption, then

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8. By "neutral and detached magistrate," we naturally use that term as it has been explicated by this Court in Shadwick v. City of Tampa (1972) 407 U.S. 345, 32 L.Ed.2d 783, 92 S.Ct. 2119.

We need not discuss in detail some procedural problems which arise under the federal rules if the complaint or information filed against a person in actual custody awaiting trial on a misdemeanor charge is not based upon probable cause, albeit there was evidence which was presented to the magistrate or judge which was offered to show probable cause and an erroneous determination made that such evidence was sufficient. If the issues were raised then it seems clear to us that the accusatory pleading could be "cured" by offering additional evidence in support of probable cause. Of course, if evidence is obtained pursuant to an arrest not supported by probable cause at the time of the arrest, then it follows under the exclusionary rules that such evidence could be suppressed on proper motion. This is, however, a matter quite independent of the

we are satisfied and respectfully submit to this Court that the courts below imposed requirements on the Florida courts and prosecutors which were not compelled by the United States Constitution. Specifically, the basis for our position is that under federal law governing federal misdemeanor prosecutions neither a defendant whose prosecution has been initiated by a complaint (unless an information is filed before the date set for his preliminary examination) nor one whose prosecution has been initiated by an information is entitled to a preliminary hearing even though he is held either in actual or constructive custody awaiting trial. However, any such defendant does have the right to have or have had an ex parte probable cause determination by a judge or magistrate - either as a basis for issuance of any arrest warrant or the filing of a complaint if he has been arrested without a warrant. Therefore, Florida courts and prosecutors are required by the courts below to accord a prisoner charged with a

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(footnote 8 continued)
question whether and how an insufficiency of the evidence in support of a determination of probable cause to hold a defendant for trial can be cured by the submission of supplemental evidence.

misdemeanor more rights than are accorded under federal law to the same class of defendants.

The justification for this position is as follows:

(a) This Court in Costello v. United States (1956) 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406, held that neither the Fifth Amendment's provision making a grand jury indictment a prerequisite of a federal trial for a capital or otherwise infamous crime nor justice nor the concept of a fair trial require that an indictment be open to challenge upon the ground that there was inadequate or incompetent evidence before the grand jury. In so holding, this Court declared:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not

required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." (350 U.S. at 363, 100 L.Ed. at 402-403, 76 S.Ct. at 408.)

(b) However, we must acknowledge that what is not required by the Fifth Amendment may be required by the Fourth, especially in the light of Morrisey v. Brewer (1971) 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 and Gagnon v. Scarpelli (1973) 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756, which set forth the rights of parole and probation violators to a "preliminary hearing" and a "final hearing" prior to the ultimate decision whether the parole or probation, as the case may be, should be revoked.[9]

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9. With respect, we cannot believe that the rules announced in Morrisey and Gagnon were intended to fully apply to persons apprehended for parole or probation violations who are only subject to misdemeanor sentences. Compare, the unqualified right to counsel announcement in criminal cases announced in Gideon v. Wainwright

(c) Under federal law, any offense neither punishable by death nor by imprisonment for a term exceeding one year is a misdemeanor. Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense. (18 U.S.C. § 1.) A misdemeanor may be prosecuted by information which may be filed without leave of court. (Rule 7(a), Federal Rules of Criminal Procedure.) A person arrested under a warrant issued upon a complaint or upon a complaint filed after his arrest "is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of a district court. . . . provided, however, that the preliminary examination shall not be held . . . if an information against the defendant is filed in district court before the date set for the preliminary examination . . . ."

(footnote 9 continued)
(1963) 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, with the qualification that right to counsel applies only when a person charged with a petty offense is to be imprisoned as announced in Argersinger v. Hamlin (1972) 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006.

(Rule 5(c), Federal Rules of Criminal Procedure.) In those cases in which a defendant is not in custody on a complaint which has been filed before or after his arrest, Rule 9(a) provides that "[u]pon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, . . ."

> ". . . . An information may be filed without leave of court and it need not be verified. This is not enough to satisfy the Fourth Amendment if a warrant is requested. In such case the information must be supported by a verified statement of facts from which the court asked to order issuance of the warrant can ascertain if there is probable cause to believe that an offense has been committed and that the defendant has committed it. . . . A complaint is sufficient for issuance of a warrant under Rule 4 though it rests on the complainant's belief, rather than his personal knowledge, so long as the sources of that

> belief are set out and are such as to justify a finding of probable cause. A similar showing should suffice under Rule 9. The standard of probable cause is discussed in connection with Rule 4." (C. Wright, Federal Practice and Procedure: Criminal § 151 p. 341 (1969). Footnotes omitted.)[10]

It is manifestly clear that a warrant shall not issue upon an information simply at the request of the attorney of the government because "[t]he decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant."

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10. The Advisory Committee Note to the proposed amendment to Rule 9(a), approved by this Court, states: "If the government requests a warrant rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause." (62 F.R.D. 274.)

(Whitely v. Warden of Wyoming State Penitentiary (1971) 401 U.S. 560, 564, 28 L.Ed. 2d 306, 311, 91 S.Ct. 1031. Footnotes omitted.)

Rule 4(a) provides that a warrant shall issue if it appears from the complaint or from an affidavit or affidavits filed with the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it. Rule 5(a) provides in part that "[i]f a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause." The proposed amendment to Rule 4 approved by this Court provides in part:

> "The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a summons or warrant, the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce. The magistrate shall promptly make or cause to be made a record or summary of such proceeding. . . ." (62 F.R.D. 271)

In view of the foregoing matters, our conclusion that a probable cause preliminary hearing in a misdemeanor prosecution is not required by the United States Constitution is fully justified by the rules in federal prosecutions, such rules having been approved by this Court. If this Court were to conclude otherwise the relevant federal rules governing misdemeanor prosecutions would have to be radically revised.

We have demonstrated how the courts below imposed requirements upon Florida courts and prosecutors which were not required by federal law (having assumed arguendo in this portion of our brief that a defendant in actual custody awaiting trial on a misdemeanor charge is entitled as a matter of automatic right - unless waived - to a probable cause determination). We shall argue in the next portion of the brief that in misdemeanor cases the United States Constitution does not require that the determination of probable cause be made if within a reasonable time after his arrest, either (1) the prisoner will be tried or (2) the issue of probable cause to hold him in custody pending trial can be determined in a hearing on a motion to suppress illegally obtained evidence when the issue in question would be concomitantly resolved.

IV

THE LAW IN CALIFORNIA PROVIDES AMPLE PROTECTION FOR A DEFENDANT IN ACTUAL CUSTODY AWAITING TRIAL ON MISDEMEANOR CHARGES WITH RESPECT TO THE RIGHT TO HAVE A PROBABLE CAUSE DETERMINATION BY A MAGISTRATE OR JUDGE AND IS OTHERWISE CONSISTENT WITH DUE PROCESS OF LAW WITHOUT THE IMPOSITION OF A REQUIREMENT THAT THERE BE A PRETRIAL PROBABLE CAUSE PRELIMINARY HEARING OR AN AUTOMATIC PRETRIAL PROBABLE CAUSE DETERMINATION UNLESS WAIVED

We have discussed the question whether the Constitution requires a probable cause preliminary hearing in misdemeanor cases of defendants awaiting trial while in actual custody. Our conclusion was that the Constitution does not require a pretrial probable cause preliminary hearing in misdemeanor cases. That discussion assumed arguendo that a defendant in actual custody awaiting trial is automatically entitled to have a pretrial probable cause determination without demand.

In the following discussion we discard, as it were, this previously asserted assumption. The position which we urge is that

there is not even an automatic right to a pretrial probable cause determination by a magistrate or judge (without a preliminary hearing). Our position is that there is a right to such a determination by a person in custody only upon demand and only when an accused in actual custody has neither been tried nor had a hearing on a motion to suppress evidence in which the probable cause issue can be determined within a reasonable period after arrest.

We have already averted in Argument I to the right, under the law of California, of a person arrested on a misdemeanor charge to be taken without unnecessary delay before a magistrate and to be speedily arraigned and tried within thirty days thereafter (unless a continuance is granted for good cause). Additionally, the California Supreme Court declared in People v. Powell (1967) 67 Cal.2d 32, 60, 429 P.2d 137, that:

> "The principal purposes of the requirement of prompt arraignment are . . . to place the issue of probable cause for the arrest before a judicial officer, to provide the defendant with full advice as to his rights and an opportunity to have counsel

appointed and to enable him to apply for bail or for habeas corpus when necessary."

Since Powell was decided in 1967 we are unaware of any reported decision by California appellate courts which have further considered the California Supreme Court's declaration that a prompt arraignment serves the purpose of placing the issue of probable cause for the arrest before a judicial officer or provides the defendant with an opportunity to apply for habeas corpus when necessary. The absence of such reported cases is not without significance. In view of the absence of reported cases which have appeared since Powell which are relevant to the instant proceeding, it is apparent that the procedures presently available in California are adequate means to protect the rights of all persons accused of misdemeanors, whether or not in custody, without either a preliminary hearing or an automatic probable cause determination. This view is fully supported by the following considerations.

First, it should be noted that Powell does not mandate that the prompt arraignment requires the magistrate to make a probable cause determination as a matter of right (unless waived). It merely refers to the prompt arraignment as providing an

opportunity for raising the issue. Second, the Powell declaration does not imply that the issue of probable cause if raised must be determined at the arraignment. Third, the absence of reported cases elucidating the Powell declaration with respect to incarcerated defendants awaiting trial on misdemeanor charges is easily explainable by the structure of the law with respect to misdemeanors.[11/] This structure of laws providing for defendants' rights with respect to misdemeanors obviates the need for either (1) probable cause preliminary hearings or (2) probable cause determinations before a speedy trial as a matter of right (unless waived).

In California, prior to trial the defendant (usually through his counsel) has the right to discover his statements and those made by expected prosecution witnesses. Since it is up to the defendant to raise the illegality of the arrest and also, as we

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11. The "structure" of California law which provides for procedural rights for a defendant charged with a misdemeanor is set forth in an appendix to this brief. We have summarized the relevant procedural rules for the convenience of this court in the appendix so that we will not burden this Court with matter in the brief proper which would disrupt the continuity of our argument.

view it, the issue whether there is probable cause to believe he has committed the offense charged, it seems to be a likely exercise in futility to schedule a probable cause preliminary hearing or other proceeding if the defendant by inspection of statements of prosecution witnesses can conclude that probable cause for holding him for trial exists. Moreover, the defendant has a right to have a pretrial hearing on a motion to suppress evidence obtained in violation of constitutional provisions pertaining to searches or seizures at which, it will frequently be the case, the probable cause to hold him for trial issue is inextricably related. In the ordinary course of events, by the time defendant (or his counsel) has examined the evidence made available by the prosecutor, noticed a motion for a probable cause determination, and a hearing or proceeding has been scheduled, the trial or pretrial hearing on a motion to suppress evidence unlawfully obtained would shortly be had anyway.

A defendant held for trial who has been arrested pursuant to a warrant has already had the benefit of a neutral and detached magistrate ruling upon the issue of probable cause. This ruling was made ex parte upon the basis of an affidavit or

affidavits, the magistrate having the discretion to examine the affiant or other persons. It seems to us anomolous that a person arrested without a warrant must be given a right (unless waived) to have a probable cause preliminary hearing at which he (and his counsel, if any) can be present, witnesses examined and cross-examined, the opportunity to present evidence in rebuttal, and the recording of the evidence taken. At most, we contend that a person arrested without a warrant or a warrant not supported by probable cause should be entitled to a probable cause determination upon demand only after raising the issue and that the determination by the court or magistrate can be made ex parte upon the basis for an affidavit or affidavits setting forth the probable cause.

We do not think it desirable to establish a constitutionally required policy to have probable cause determinations upon demand in advance of a trial which will take place within a reasonable time after arrest because the calendaring of such matters would tend, in all likelihood, to cause further congestion in inferior courts and likely generate many otherwise unnecessary continuances.

Among the reasons for the absence of complaints is that the presumption that arrests without warrant are lawful until the issue has been timely raised is well justified. With respect to arrests based upon probable cause for felonies not committed in the presence of the arresting officer, citations to cases are not necessary to establish what a mine field an officer must traverse in order to insure that he does have probable cause to arrest and legal grounds to enter a structure to make an arrest. However, in the overwhelming majority of misdemeanor cases, warrantless arrests are made based upon probable cause that the defendant committed the offense in the presence of the officer. In our opinion, it is relatively a rare case (quite apart as to the question whether a conviction can be obtained) in which the arresting officer did not have probable cause to believe an offense was committed in his presence.[12/] In California, the

12. There are exceptions. A defendant may be arrested for a felony based upon probable cause but for some reason he is only charged with a misdemeanor. In some cases the probable cause concerning the misdemeanor is established at the felony preliminary hearing. In other cases the prosecutor may choose to file a misdemeanor complaint. It is our opinion that such cases constitute a substantial but minor portion of the cases prosecuted as misdemeanors.

filing of the complaint must be with the approval of a prosecutor and thus serves as a check upon arrests made by peace officers or private persons.

It is for these reasons why we think that the probable cause issue has a true and a false side to it. The false side arises because it appears that in Florida it was the common practice to defer arraignment of persons in actual custody for more than a substantial time and that the time for trial would be correspondingly deferred. By contrast, we are unaware that such delays that have been formerly common in Florida takes place in California on a scale such as to provoke the expression of grievances in news media or learned journals.

Our discussion has not explored all the contingencies which can arise which require consideration. For example, while we urge that a trial or a hearing on a motion to suppress evidence within thirty days (approximately) of the arrest provides an adequate substitute for a probable cause preliminary hearing, the question of a probable cause determination may become "real" if the case is continued for trial or for a hearing on a motion to suppress beyond a reasonable time. In any event, the remedy is not dismissal. Possibilities

include: (1) release of the defendant on his own recognizance as being constitutionally compelled in appropriate cases; (2) a probable cause determination upon demand and after a noticed motion, such determination being made ex parte by a magistrate or judge upon affidavit or affidavits; (3) denial of a continuance if the prosecution has not or is unable to make a sufficient showing of probable cause; or (4) dismissal of the action if the prosecution has not or is unable to make a sufficient showing of probable cause. We mention such possibilities only to show how the several states could where necessary develop rules in accord with their procedures.

Finally, the position we have taken herein that there is no federal constitutional right to an automatic pretrial probable cause determination by a magistrate (unless waived) in misdemeanor cases appears to be supported by Rule 12(b)(2), Federal Rules of Criminal Procedure, namely that "[d]efenses and objections based on defects in the institution of the prosecution . . . may be raised only by motion before trial" and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." As this Court

explained in Davis v. United States (1973) 411 U.S. 233, 36 L.Ed.2d 216, 221, 93 S.Ct. 1577, 1580: "By its terms it applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction thereof."[13/] Thus, it is clear that the federal rules envision the defendant as having to raise the issue of probable cause with respect to informations. If our position is not upheld by this Court we find it difficult to see how federal rules are not in need of radical revision.

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13. Rule 12(b)(4) provides that "[a] motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct." See also the proposed amendment to Rule 12, as approved by this court, and Advisory Committee Note on proposed subdivision (e) (62 F.R.D. 287, 291), and the Advisory Committee Note on the proposed amended version of Rule 9 that "a defendant can, at a proper time, challenge an information issued without probable cause" in cases in which an arrest warrant is issued on an information (62 F.R.D. 274).

V

THE REQUIREMENT THAT PROBABLE CAUSE PRELIMINARY HEARINGS ARE REQUIRED FOR MISDEMEANORS CONSTITUTES IMPROPER SUPERVISION OF THE ADMINISTRATION OF CRIMINAL JUSTICE OVER STATE COURTS BY FEDERAL COURTS

Up until this point, we have avoided discussion of the procedural question whether a United States District Court Judge had jurisdiction to interfere by declaratory and injunctive action with duly constituted state criminal proceedings on the question of probable cause preliminary hearings. It had been sufficient for our purposes to discuss the merits. However, in view of the positions adopted and advocated in this brief it becomes clear that the relief provided by the courts below goes far beyond what is constitutionally required. Indeed, in considering what is constitutionally required it is not inappropriate to bear in mind the reasons for the long standing public policy against federal court interference with state court proceedings. Such reasons have been expounded fully in Younger v. Harris (1971) 401 U.S. 37, 43-50, 27 L.Ed.2d 669, 675-679, 91 S.Ct. 746, and its companion cases.

The principle of federalism is not one of expediency but of constitutional dimension. If not vindicated by this Court, that fundamental principle will become

> ". . . but a walking shadow, a
> poor player
> That struts and frets his hour
> upon the stage
> And then is heard no more: it
> is a tale
> Told by an idiot, full of sound
> and fury,
> Signifying nothing." (William
> Shakespeare, Macbeth, Act V,
> Scene 5, lines 24-28.)

The same policy and constitutional considerations which limit the availability of injunctive and declaratory relief by federal courts with respect to state court proceedings as considered in Younger v. Harris (and its companion cases) is exhibited in other ways. The decisions by this Court, which fashioned exclusionary rules inherently or existentionally implied by federal constitutional provisions with respect to illegally obtained evidence, "established no assumption by this Court of supervisory authority over state courts, . . . and, consequently, it implied no total obliteration of state laws relating

to arrests and searches in favor of federal law. Mapp [v. Ohio (1961) 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684] sounded no death knell for our federalism; rather it echoed the sentiment of Elkins v. United States, supra (364 at 221) that 'a healthy federalism depends upon the avoidance of needless conflict between state and federal courts' by itself urging that '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.' 367 U.S., at 658. (Emphasis added.)" (Ker v. California (1963) 374 U.S. 23, 31, 10 L.Ed.2d 726, 736, 83 S.Ct. 1623.) We cannot see how the courts below have respected the same fundamental criteria relating to any constitutional requirement concerning probable cause to detain a prisoner for trial since they have imposed upon the State of Florida procedural rules which are not compelled by the Constitution and which are, moreover, more stringent than those rules applicable to federal courts, magistrates, and prosecutors.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court disapprove so much of the relief granted by the court below which requires that persons in actual custody on misdemeanor charges be accorded a probable cause preliminary hearing.

Respectfully submitted,

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APPENDIX

SUMMARY OF CALIFORNIA PROCEDURAL RULES RELEVANT TO THE ISSUE OF WHETHER A DEFENDANT AWAITING TRIAL IN A MISDEMEANOR PROSECUTION WHILE IN ACTUAL CUSTODY IS ACCORDED DUE PROCESS OF LAW

(a) Every person arrested with or without a warrant must be taken before a magistrate without unnecessary delay, and in any event within two days after his arrest excluding Sundays and holidays. (People v. Powell, supra; Cal. Pen. Code, §§ 825, 847, 849.)

(b) When an arrest is made without a warrant, a complaint stating the charge against the arrested person must be laid before such magistrate. (Pen. Code, § 849.)

(c) An arrest with or without a warrant by either a peace officer or private person must be supported by probable cause. (U.S. Const., Amend. IV; Cal.Const., Art. I, § 19; Giordenello v. United States (1958) 357 U.S. 480, 2 L.Ed.2d 1503, 78 S.Ct. 1245; Barnes v. Texas (1965) 380 U.S. 253, 13 L.Ed.2d 818, 85 S.Ct. 942; People v. Sesslin (1968) 68 Cal.2d 418, 439 P.2d 321.)

(d) By statute, an arrest without a warrant by a peace office of a person for

a misdemeanor or an infraction must be based upon reasonable cause to believe that the person to be arrested has committed a public offense in the officer's presence. (Cal.Pen.Code, § 836.) An arrest for a misdemeanor or infraction by a private person is lawful only "[f]or a public offense committed or attempted in his presence." (Cal.Pen.Code, § 837.) The only noteworthy exception is that a peace officer may make a warrantless arrest of a "person involved in a traffic accident when the officer has reasonable cause to believe that such person had been driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug." (Cal. Veh.Code, § 40300.5.)

(e) Any peace office may release from custody, instead of taken such person before a magistrate, any person arrested without a warrant whenever he is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested. (Cal.Pen.Code, § 849, subd. (b)(1).)

(f) "It is presumed that official duty has been regularly performed. This presumption does not apply to an issue as to the lawfulness of an arrest if it is

found or otherwise established that the arrest was made without a warrant." (Cal. Evid.Code, § 664.) "In the absence of evidence to the contrary, it is presumed that the officers acted legally. . . . When, however, the question of the legality of an arrest or of a search and seizure is raised . . . , the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification." (Badillo v. Superior Court (1956) 46 Cal.2d 269, 272; 294 P.2d 23.)

(g) Misdemeanor criminal complaints filed by a private citizen without the district attorney's authorization are nullities and the court lacks jurisdiction to act except to dismiss them. (People v. Municipal Court (1972) 27 Cal.App.3d 193, 103 Cal.Rptr. 645.)

(h) A misdemeanor prosecution, except when otherwise provided by law (e.g., written promises to appear executed by persons who are not detained in custody when a citation is issued) is commenced by the filing of a verified complaint. (Cal. Pen.Code, §§ 740, 853.5-853.8, 949, 959.)

There is no requirement that the complaint be supported by an affidavit (or declaration under penalty of perjury) unless a warrant is to be issued. (Cal.Pen.Code, § 147, subd. (b).)

(i) A complaint stating the charge against a person arrested without a warrant shall be laid before the magistrate when the arrested person is taken before the magistrate without unnecessary delay following the arrest. (Cal.Pen.Code, § 849.)

(j) At the arraignment, the defendant may place the issue of probable cause for the arrest before a judicial officer and is provided with full advice as to his rights and an opportunity to have counsel appointed and is enabled to apply for bail or for habeas corpus when necessary. (People v. Powell, supra, 67 Cal.2d at 60.)

(k) "If on the arraignment, the defendant requires it, he must be allowed a reasonable time to answer, which shall be . . . not more than seven days for an offense originally triable in an inferior court." (Cal.Pen.Code, § 990.)

(l) The arraignment of a defendant is not complete until a plea is entered. (People v. Terry (1970)14 Cal.App.3d Supp. 1, 92 Cal.Rptr. 479.)

(m) "In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him." (Cal.Pen.Code, § 987, subd. (a).)[1/]

N.B. "Crimes and public offenses include: . . . 3. Infractions." (Cal.Pen.Code, § 16.) "An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him unless he is arrested and not released on his written

1/ Of course, a defendant who is unable or unwilling to post bail is most frequently unlikely to afford private counsel and therefore the court would appoint counsel for him at public expense, unless he validly waives his right to counsel.

promise to appear, his own recognizance, or a deposit of bail." (Cal.Pen.Code § 19(c).)

(n) As a general rule, a defendant in a criminal case may, for purposes of impeachment, inspect the statements or recorded conversations of any witness whom the prosecution intends to call at trial. This rule includes the statements of one's codefendants in a joint trial. He is also entitled to inspect before trial any record of statements made by him, whether or not they are otherwise admissible into evidence. (See, e.g. Joe Z. v. Superior Court (1970) 3 Cal.3d 797, 801-806, 478 P.2d 26; Witkin, CALIFORNIA EVIDENCE (2d Ed. with 1972 supplement), §§ 1055 et seq.,)

(o) The initial burden of raising the issue of the illegality of an arrest for the purpose of moving to suppress evidence rests upon the defendant. (People v. Carson (1970) 4 Cal.App.3d 782, 786, 84 Cal.Rptr. 699.)

(p) A motion to suppress evidence must be made and heard prior to trial at a special hearing, unless prior to trial opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion. (Cal.Pen.Code, § 1538.5, subd. (g) and subd. (h).)

(q) If a motion to suppress evidence under Penal Code section 1538.5 is granted at a pretrial special hearing and the prosecution acknowledges it cannot proceed to trial without the suppressed evidence, the court in its discretion may dismiss the case on its own motion. (Cal. Pen. Code, §§ 1538.5; 1385; 1238, subd. (a)(7).)[2/]

(r) If a defendant's motion to suppress evidence is granted under Penal Code section 1538.5, and the case is dismissed pursuant to section 1385 or the people appeal in a misdemeanor case as authorized by section 1538.5, subdivision (j), the defendant shall be released on his own recognizance if it appears that he will surrender himself to custody as agreed if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully

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2. While our opinion is that the overwhelming majority of misdemeanor cases arise by arrests by peace officers, § 1538.5 is only limited to motions to suppress evidence obtained in violation of constitutional provisions relating to searches and seizures. Thus, we must acknowledge that there may be a significant number of cases, albeit a minority, where the issue of probable cause to hold a defendant for trial would not be reached by a pretrial motion to suppress evidence.

ordered by the court to be resumed to custody. (Cal.Pen.Code, §§ 1318, 1538.5, subd. (k).)

(s) "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: . . . .3. Regardless of when the complaint is filed, when a defendant in a misdemeanor case in an inferior court is not brought to trial within 30 days after he is arraigned if he is in custody at the time of arraignment, . . ." (Cal. Pen.Code, § 1382.)